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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

- v -

STATE OF FLORIDA,

Respondent.

REPLY TO THE STATE'S RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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We briefly reply to the response of the Attorney General of Florida to the petition for certiorari.

I

In point I of the petition we urged that the Court grant certiorari to consider whether the prosecution's closing arguments were so grossly improper and inflammatory that they deprived petitioner of his Fourteenth Amendment right to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637

(1974). The state's response only serves to confirm the sour ness of the position that we advanced. Indeed, we submit tha on the basis of the petition and the response, a summary reve sal of the judgment below would be warranted.

The state's response acknowledges that the conduct of the prosecutors in summation to the jury "constituted a violation the Code of Professional Responsibility" (response p. 6).* It, nonetheless, seeks to sustain the judgment convicting petitione and sentencing him to death by reliance upon a series of plainl specious claims, the principal one of which is that the evidenc of petitioner's guilt was "overwhelming" and that, therefore, the prosecutors' misconduct was "harmless beyond a reasonable doubt" (response p. 7).

The state's assertion that the evidence against petitioner was "overwhelming" is, put most bluntly, nonsense; hence, its reliance on the harmless-constitutional-error doctrine is wholly misplaced.

We will not dwell upon the evidence here; it was set out fairly and with precision in our petition. Indeed, the state's recitation of the facts does not diverge sharply from our own.**

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*References are to the pages of the response of the Attorney General of Florida; references preceded by the letter "R." are to the pages of the record on appeal to the Florida Supreme Court.

**We assume that the Attorney General's statement that the assailant committed a sexual assault on Mrs. Turman in the course of the crime was an inadvertent error (response p. 5). Mrs. Turman's own testimony was crystal-clear that the assault, though threatened, never, in fact, occurred (R. 210-11).

Suffice it to say that, unlike the harmless error cases cited by the state in its response (p. 7), here there was no confession by the petitioner, no incriminating testimony from an accomplice, no ballistic evidence linking the gun introduced in evidence to the murder, no finger prints, and no other tangible evidence connecting petitioner to the crime.*

Rather, as we described in full in the petition, the case against Darden turned in overwhelming measure upon the identification testimony of two witnesses to the crime -- identification testimony the accuracy of which was subject to substantial doubt. Thus, when the case went to the jury, its members were obliged to decide whether to credit the questionable identifications by the prosecution's witnesses or to accept petitioner's plausible explanation of his movements on the evening of the crime. In this circumstance, a summation by the prosecution confined to the evidence and free of inflammatory digressions was crucial; the contention of the state that the content of the summation that actually occurred, however blatantly improper, could have made no real difference in the jury's deliberations is frivolous.

Indeed, we submit that prosecutor McDaniel's plainly pre-

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*All three of the cases cited by the state, Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); and Harrington v. California, 395 U.S. 250 (1969), involved properly admitted confessions by the appellants, and, as the Court phrased it in Schneble, the confessions were "corroborated by other objective evidence and ... not contgradicted by any other evidence."

meditated and repeated focus in his closing argument upon matters wholly irrelevant to the evidence itself persuasively demonstrates his own recognition of the thinness of his case. Surely, no prosecutor would engage in so needlessly studied a course of improper argument, if he supposed that the evidence favoring conviction was overwhelming.

In view of the actual frailty of the prosecution's case against petitioner the language of the Court in Chapman v. California, 386 U.S. 18, 22 (1967), is particularly apt:

> "In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievious results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the quesiton of guilt or innocence is a close one."

Similarly, the Court's reasoning in Chapman, explaining why repeated prosecutorial comment upon a defendant's failure to testify was not harmless, applies as well to the prosecution's summation in our case:

> "Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduciton against a defendant of a coerced confession." 386 U.S. at 26.

In sum, the state's claim of harmless constitutional error here cannot be taken seriously.

Only a few paragraphs need be added to dispose of the

state's other efforts to prop up the judgment of the Florida Supreme Court against our arguments concerning the prosecutors' summation. First, the state seems to suggest that the scope of this Court's review is somehow restricted by the conclusion of the court below that the prosecutors' conceded misconduct was harmless (response pp. 6-7). This Court has repeatedly emphasized, however, its duty to decide for itself whether a trial record evidences a deprivation of constitutionally protected rights. E.g., Blackburn v. Alabama, 361 U.S. 199, 205 n. 5 (1960). Surely, this obligation is at its most urgent when life itself is at stake.

Second, the state seeks to excuse the prosecution's conduct by urging that McDaniel's summation was "in part responsive to defense counsel's remarks" (response p. 7) and that his improper arguments should be overlooked because they were made "in the heat of argument" -- almost involuntarily, as it were (response p. 6). Understandably, respondent offers no citation to the trial record to support these assertions, and none would, in fact, be possible.

The supposed defense provocation -- which, in any event, related to only one of the less offensive of the prosecutor's many improper remarks -- concerned McDaniel's characterization of petitioner as "an animal" who belonged "at the other end of [a] ... leash" (R. 750). The alleged provocation -- quoted by the Supreme Court of Florida in its opinion, Darden v. State, 329 So. 2d 287, 289 (Fla. 1976) -- was nothing more than a prior comment by one of the petitioner's attorneys that anyone who would commit crimes of the sort charged by the state would be a "vicious animal" (R. 717). Defense counsel, of course, did not apply this characterization to petitioner.

Finally, the suggestion that prosecutor McDaniel's numerous improper statements were mere slips of the tongue "in the heat of argument" is belied simply by a reading of his entire summation. Surely, the constant repetition of so many inflammatory and irrelevant themes cannot have been accidental. Rather, his conduct is explicable on no other premise than as a conscious choice by the prosecutor to draw the jury's attention away from the testimony upon which it was supposed to found its verdict.

In sum, none of the flimsy arguments the state advances to excuse the prosecution's repeated violations of the Code of Professional Responsibility and to sustain the judgment below is deserving even of detailed scrutiny by the Court. We submit that a summary reversal is in order. Failing that, certiorari should be granted to consider whether the prosecution's misconduct deprived petitioner of a fair trial.

II

We argued in our petition that certiorari should also be granted to consider whether the admission in evidence on the state's direct case of a wantonly and needlessly suggestive pretrial identification by Mrs. Turman or of two at-trial identifications of petitioner subsequent to impermissively suggestive pretrial idenficiations deprived Darden of due process of law (petition pp. 27-39).

As the state implicitly acknowledges (response p. 8), the first of these two issues is substantially that already before the Court in Brathwaite v. Manson, 527 F. 2d 363 (2d

Cir. 1975), cert. granted, 48 L. Ed. 2d 202 (May 3, 1976, No. 75-871). We asked that the Court grant certiorari and consider the consitutionality of the admission in evidence of the pretrial identification of petitioner along with the Brathwaite case, and the state's response suggests no reason why this should not be done.

As we described in the petiton, the Brathwaite issue arose here when Mrs. Turman was permitted to testify at trial concerning her identification of petitioner at a preliminary hearing four days after the murder. Petitioner was the only black person in the courtroom at the time of that pretrial confrontation and, as we showed in the petition, the prosecution led Mrs. Turman into identifying petitoner as her husband's murderer.

In response, the state wholly misses the thrust of our argument, contending that the original identification of petitioner by Mrs. Turman and the admission in evidence of testimony as to its occurrence did not violate Darden's rights because the identification was made in the presence of a judge and defense counsel "for the sole purpose of determining the existence of probable cause to bind the Petitioner over for trial" (response p. 8).

Both the purpose for which the confrontation was arranged and the presence of counsel and a judge during it are irrelevant to the claim we advance. What is crucial is the manner in which the pretrial identification was conducted and the use to which it was put at petitioner's trial.

If the state wished to utilize at trial testimony of a nearly contemporaneous identification of petitioner by the witnesses to the crime, it had ample opportunity to conduct a proper line-up prior to the preliminary hearing; it suggests no reason why this could not have been done. Moreover, having failed to conduct such a line-up, the prosecution could, at the least, have refrained from eliciting on its direct case testimony concerning the identification of petitioner at the preliminary hearing. Certainly, it is a non sequitur to contend that, because a preliminary hearing is required by Florida law, an identification procedure violative of a defendant's rights may be employed at such a hearing and that the wrong may then be compounded with impunity by the use at trial of testimony as to the earlier identification.

Finally, the state's response to point II of the petition -- apparently directed to the issue presented by Simmons v. United States, 390 U.S. 377 (1968) -- emphasizes Mrs. Turman's certainty concerning her identification of petitioner at the preliminary hearing. As if to drive home its point, the state quotes (response p. 9) the following exchange from the preliminary hearing:

> "The Court: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?
>
> A: Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, "That's him'" (R. 53).

It seems evident to us that Mrs. Turman's claim that she was able to identify her husband's assailant immediately

upon seeing the back of the head of the only black man present demonstrates much more effectively thatn anything else we might say just how suggestive the show-up at the preliminary hearing was.

III

In the final point of the petition we urged that the Court grant review to decide whether the exclusion for cause of five veniremen because of their expressed attitudes toward the death penalty was inconsistent with the Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968) (petition pp. 40-48).

Apparently, the state concedes that the trial court's exclusion of venireman Murphy was contrary to Witherspoon, if the court's perfunctory interrogation of Mr. Murphy is considered alone (response p. 15). Respondent argues, however, that Mr. Murphy's erxclusion and the trial court's interpretation of his ambiguous responses to its questions were justified because this venireman was present in the courtroom when all of the other prospective jurors were examined.

This contention is inconsistent with the Witherspoon holding that the existence of disqualifying factors must be "unmistakably clear." 391 U.S. at 522 n. 21. Indeed, the Court apparently rejected an argument like that advanced here five years ago. Washington v. Adams, 76 Wash. 2d 650, 458 P. 2d 558, 575 (1969), rev'd per curiam, 403 U.S. 947 (1971).

The state also suggests that Witherspoon is irrelevant to the present case, because Florida law renders the jury's role in sentencing merely advisory. The Court's opinion in Witherspoon, however, expressly made its holding applicable to pro-

cedures under which juries "impose or recommend" the death penalty. 391 U.S. at 522. The soundness of this application is plain, for the Florida Supreme Court has emphasized that the jury's recommendation may be a "crucial factor in determining whether or not the death penalty should be imposed." LeMadline v. Florida, 303 So. 2d 17, 20 (Fla. 1974).

Respectfully submitted,

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